Supreme Court, U.S.
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No. 98-1133

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

THE SHERWIN-WILLIAMS COMPANY,
Petitioner,

v.

NEW YORK STATE TEAMSTERS CONFERENCE
PENSION AND RETIREMENT FUND,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals properly confirmed an arbitration award when Petitioner failed to prove that the arbitrator made clearly erroneous findings of fact, had a bias against Petitioner or applied a statutory evidentiary presumption to Petitioner's detriment.

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, Respondent, New York State Teamsters Conference Pension and Retirement Fund, states that it is not a corporation, and has no parent company or nonwholly owned subsidiary.

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RESPONDENT'S BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE [1]

This case arises under the Multiemployer Pension Plan Amendments Act ("MPPAA" or "Act"), which amended the Employee Retirement Income Security Act.[2] MPPAA makes participating employers that cease contributing to a pension fund liable to the fund in certain circumstances for "withdrawal liability." In relevant part, MPPAA provides that withdrawal liability is to be determined and

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[1] In this brief, "Pet. ——" references are to the Petition for a Writ of Certiorari, and "A. ——" references are to the Appendix to the Petition.

[2] The Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*, as amended by the Multiemployer Pension Plan Amendments Act of 1980, codified in relevant part at 29 U.S.C. § 1381 *et seq.*

collected without regard to any transaction entered into by an employer "[i]f a principal purpose" of the transaction is to "evade or avoid" that liability. 29 U.S.C. § 1392(c). If such a purpose exists, then the fund can assess withdrawal liability against the employer as if the transaction (typically a sale or similar transfer) had never occurred. *See id.*

An employer can contest a fund's determination of withdrawal liability, but only by submitting that issue to a MPPAA arbitrator. 29 U.S.C. § 1401(a). Under 29 U.S.C. § 1401(a)(3)(A), the fund's determination "is presumed correct" in the arbitration unless the employer convinces the arbitrator otherwise "by a preponderance of the evidence." *Concrete Pipe & Prods. of California, Inc. v. Construction Laborers Pension Trust for Southern California,* 508 U.S. 602, 629 (1993). Similarly, if an employer seeks judicial review of the arbitration decision, there is "a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct." 29 U.S.C. § 1401(c). Such findings will be set aside only if found to be "clearly erroneous." *See* A. 11; *see also Jos. Schlitz Brewing Co. v. Milwaukee Brewery Workers' Pension Plan,* 3 F.3d 994, 998-99 (7th Cir. 1993), *aff'd,* 513 U.S. 414 (1995).

In this case, Petitioner, The Sherwin-Williams Company, sold a wholly owned subsidiary, Lyons Transportation Lines, Inc. ("Lyons"), to J.R.C. Acquisition Corporation ("JRC"), a company that Sherwin-Williams knew had no assets, no financial backing and no corporate affiliation, at a price well below that offered by other bidders. It did so despite its knowledge that JRC had unsuccessfully sought financing for the original stock-for-cash transaction from more than 40 banks and real estate investors. Four months after the sale, both Lyons and JRC filed for bankruptcy. Respondent, New York State Teamsters Conference Pension and Retirement Fund ("Fund"), later determined that a principal purpose of the sale was to evade

or avoid Lyons' withdrawal liability. The Fund ultimately demanded that Sherwin-Williams pay Lyons' withdrawal liability in the amount of $477,270, including $35,795 in "gap year interest."[3] (A. 4-8, 12-17.)

Sherwin-Williams submitted the Fund's "evade or avoid liability" and "gap year interest" determinations to an arbitrator whom it and the Fund had selected. After a four-day hearing and pre- and post-hearing briefing, the arbitrator issued a 63-page decision. The arbitrator ruled in favor of Sherwin-Williams on the "gap year interest" issue, and in favor of the Fund on the "evade or avoid liability" question. (A. 8, 29.)

The Magistrate Judge, the District Court and a unanimous panel of the Court of Appeals affirmed the arbitrator's decision. The Sixth Circuit disposed of each of Petitioner's arguments in a detailed opinion reproduced at A. 1-20. After "reviewing the [arbitration hearing] exhibits and testimony, as well as the arbitrator's thorough and well-reasoned analysis" of the facts in his lengthy decision, the Court of Appeals first held in Part II.A of its opinion that Sherwin-Williams had failed to carry its statutory burden of rebutting, "by a clear preponderance of the evidence," the MPPAA presumption (29 U.S.C. § 1401(c)) that the arbitrator's findings of fact were correct. (A. 11-17.)[4]

The panel (in Part II.B of the opinion) then disposed of Petitioner's contention that a "statement" by the arbitrator proved that the arbitrator was biased against it and its witnesses:

> This "statement" is pieced together out of the final four pages of the arbitrator's 63-page decision and

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[3] This sum was a year's interest from the date the Fund determined the liability amount (December 31, 1989) to the assumed first payment date of January 1, 1991. (A. 29.)

[4] Those facts, set out in the Court of Appeals' opinion (A. 2-7, 11-17) and in the arbitrator's decision (A. 60-69, 102-07, 116-19), are incorporated herein by reference.

> opinion, ... Even considering this patchwork quotation in isolation, we find in it no indication of bias against Sherwin-Williams. The arbitrator observed that it would be impossible for a company such as Sherwin-Williams not to take withdrawal liability into consideration. In fact, the record is replete with evidence that Sherwin-Williams's employees discussed the issue frequently while deciding what to do about Lyons. The arbitrator opined that "in the overall context" the evasion or avoidance of withdrawal liability was a principal factor. *The arbitrator's task is to make precisely that kind of determination; i.e., to determine what, in the overall context, were the employer's principal purposes for undertaking the transaction at issue. The arbitrator's statement is not evidence of bias, but rather the articulation of a conclusion with which Sherwin-Williams disagrees.*

(A. 17-18 (emphasis added).)

Part II.C of the opinion (A. 18-20) agreed with Sherwin-Williams that the arbitrator failed to apply the statutory MPPAA presumption in favor of the Fund, but found it harmless error because the only harm was to the *Fund*, not Sherwin-Williams:

> The standard the arbitrator actually used was more favorable to Sherwin-Williams than the law allows, and the arbitrator still found against Sherwin-Williams. Sherwin-Williams cannot expect to find any more success under a less favorable standard.

(A. 20.)

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE COURT OF APPEALS' DECISION DOES NOT RAISE ANY OF THE QUESTIONS PRESENTED

A. Question I asks whether "intent" can be determined "without considering the subjective evidence" of it. But the Sixth Circuit did not answer (and Petitioner never

asked it to answer) that question. What the Court of Appeals did decide, after evaluating *all* the evidence—direct, indirect, circumstantial, objective and subjective—was that Petitioner had not carried its burden of rebutting the MPPAA presumption that the arbitrator correctly found the facts. The arbitrator likewise considered Petitioner's subjective beliefs, but found them unworthy of credence, a finding sustained by the Sixth Circuit, "[g]iven the cornucopia of evidence" to support it. (A. 14.) In the absence of any actual controversy over this issue, Question I could be answered only by rendering an impermissible advisory opinion, and then on an evidentiary ruling in a single arbitration proceeding that would not constitute an "important matter" worthy of this Court's attention. *See* Rule 10(a) of this Court; *see also United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

B. The premise of Question II is that the Court of Appeals judicially grafted onto MPPAA a new "express and fatal presumption" that a Fortune 200 company "always" considers withdrawal liability. The panel opinion is bereft of any such exercise in judicial lawmaking. All the Sixth Circuit did in this regard was to apply the presumptions and standards of review set out in MPPAA, as construed by this Court in *Concrete Pipe*, and hold that Petitioner had failed to carry its burden of demonstrating that a MPPAA withdrawal liability arbitration award should be vacated.[5]

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[5] A corollary premise of Question II appears to be that this Court should decide whether the arbitrator was biased against Sherwin-Williams. But even Petitioner concedes that "[p]erhaps the mere bias of a single arbitrator would not be a sufficient basis to invoke this Court's intervention." (Pet. 17.) Moreover, the courts below uniformly concluded that there is no record evidence of bias. To the contrary, the arbitrator ruled in favor of Sherwin-Williams on one of the two questions it asked him to answer (A. 8) and, as the Court of Appeals observed, "[i]f anything, the arbitrator gave *Sherwin-Williams* an advantage by failing to give the *Teamsters*

C. Question III likewise is not presented. MPPAA forbids an employer from using a stock sale as a means to evade or avoid withdrawal liability, commands arbitrators to assess such liability if they find, after examining all the evidence through the prism of the MPPAA presumptions, that such was a principal purpose of the transaction, and directs the district court and the court of appeals to confirm the award under MPPAA's narrow standard of review unless the employer meets its statutory burden of proof. The arbitrator, the Magistrate Judge, the District Court and the Court of Appeals simply followed the statute's mandate. Such faithfulness to the dictates of the Act hardly "shakes the foundation of MPPAA's statutory scheme" (Pet. i); rather, it cements it. Stripped of its hyperbole, Petitioner's true complaint is that the Sixth Circuit erred in affirming the District Court's confirmation of the arbitral award. Of course, that affords no sufficient reason for review by this Court.

II. THERE IS NO CIRCUIT CONFLICT; IN ANY EVENT, THE LEGAL ISSUE WAS NOT RAISED BELOW AND IS NOT PROPERLY PRESENTED HERE ON THE FACTS

A. Petitioner says that the Third, Sixth and Seventh Circuits differ "when analyzing whether a parent company sold its subsidiary with a principal purpose of evading or avoiding withdrawal liability." (Pet. 7.)[6] But the three

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Fund the benefit of the required statutory presumption" (A. 18 (emphasis added)).

[6] *Dorn's Transp., Inc. v. Teamsters Pension Trust Fund of Philadelphia & Vicinity*, 787 F.2d 897 (3d Cir. 1986); *Trustees of Teamsters Pension Trust Fund of Philadelphia & Vicinity v. Federal Express Corp.*, Nos. 86-304, 94-017, 94-033, 94-112 and 94-130, 1995 WL 791371 (D. Del. Dec. 27, 1995), *aff'd without opinion*, 96 F.3d 1432 (3d Cir. 1996), *cert. denied*, 117 S. Ct. 1328 (1997); *Santa Fe Pacific Corp. v. Central States, Southeast & Southwest Areas Pension Fund*, 22 F.3d 725 (7th Cir.), *cert. denied*, 513 U.S. 987 (1994).

cases Sherwin-Williams cites (Pet. 8-10) "differ" only in the facts presented—all (not surprisingly) analyze the issue the same way as the statute commands and reach different conclusions on those varying facts. This Court does not sit to resolve "conflicts" among the courts of appeals created solely by differing fact patterns. *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 392-93 (1923); *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502-03 (1951).

Petitioner proceeds from the false premise that because all three cases involved a parent selling a subsidiary, and the circuits reached different results, these circuit courts must be in conflict. Given this Court's prudential limitations on its certiorari jurisdiction, such reasoning backward from the result cannot create a "conflict" worthy of this Court's attention. And, if there were such a conflict here so "particularly important and urgent" (Pet. 12) for this Court to review on certiorari, then one of these circuits would have identified it—none did. In any event, Petitioner nowhere suggests that the facts here would have led to a different result in any other circuit. Without such a demonstration, there is no reason for this Court to entertain the Petition.

B. Additionally, a review of these cases shows the conflict to be both irrelevant to the Petition, as well as illusory. None of the decisions mentioned, let alone decided, any of the Questions Presented that Sherwin-Williams tenders in its Petition. Nor is there any conflict among them on what they did decide. *Dorn's* did not even involve an arbitration decision, but only summary judgment on the question whether, in the "unusual circumstances" of a "rare case in which there was no need for the development of a factual record," and as a matter of statutory construction, a "withdrawal" took place upon which liability could be assessed. The Third Circuit held it had not. 787 F.2d at 898, 901, 903.[7] In *Santa Fe*, on the other hand,

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[7] Moreover, the Third Circuit "appears to have limited *Dorn's* to its particular facts." *Carl Colteryahn Dairy, Inc. v. Western*

the Seventh Circuit set aside an arbitral decision that avoidance of withdrawal liability had *not* been a principal purpose of the sale. 22 F.3d at 729-30. Moreover, the Sixth Circuit here, like the Seventh Circuit there (and the Third Circuit in *Dorn's*), did consider the seller's intent. There is thus no conflict requiring this Court's intervention.

C. To the extent the unreported district court opinion in *Federal Express* found a buyer's subjective intent to be germane, the record discloses that Petitioner never presented the buyer's intent issue to the District Court or the Sixth Circuit.[8] As a consequence, neither court considered it. Petitioner's failure to raise and preserve this evidentiary issue below should foreclose its review here. Petitioner nowhere explains why this Court should deviate from its settled practice and reach the merits of an issue neither raised in a Question Presented (*see* this Court's Rule 14.1(a)), nor pressed or passed upon in the lower courts. *Powell v. Nevada,* 511 U.S. 79, 85 n.* (1994) ("Because the issue was not raised, argued, or decided below, we should not settle it here."). Petitioner's failure to do so confirms that there is nothing about this lone fact-bound arbitration decision—upheld by each of the five judges who reviewed it—that warrants a grant of the Petition.

Pennsylvania Teamsters & Employers Pension Fund, 847 F.2d 113, 123 n.17 (3d Cir. 1988) (citing *Flying Tiger Line v. Teamsters Pension Trust Fund of Philadelphia & Vicinity*, 830 F.2d 1241 (3d Cir. 1987)), *cert. denied*, 488 U.S. 1041 (1989).

[8] In any event, the district court ruling in *Federal Express* would not pose the conflict with the Seventh Circuit's "buyer's intent" dictum in *Santa Fe* that Petitioner attempts to manufacture. An independent alternative ground for decision in *Federal Express* was that on the facts there presented, evading or avoiding withdrawal liability was not "a primary purpose" of the *seller*. (A. 130-34.) It was for this reason that the district court painstakingly and at length (A. 131-33) distinguished *Santa Fe* on its "seller's intent" facts—a needless exercise if the *Federal Express* district court opinion and *Santa Fe* turned on the supposed "buyer's intent" conflict on the law between the circuit courts that Petitioner posits.

D. Petitioner did not adduce *any* proof in the arbitration as to what the buyer's subjective intent was, much less sufficient proof to rebut the statutory presumption in favor of the Respondent Fund. As "the party more likely to have information relevant to the facts about its withdrawal from the [Fund]," Petitioner had the burden to do so. *Concrete Pipe*, 508 U.S. at 626.[9] Accordingly, even if there were a circuit conflict on the law as to the relevance of the buyer's subjective intent, Petitioner's failure of proof precludes its resolution on this record.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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[9] Nor did Petitioner proffer any such "buyer's intent" evidence three years after the arbitration hearing closed, when it prevailed upon the District Court to allow it to put into the record allegedly "new" evidence supposedly bearing on *Sherwin-Williams'* intent. (A. 29-31, 38-39.) Over the Fund's strenuous objections (which the District Court acknowledged were "well taken"), the District Court "reviewed the new evidence" and "determined that it would not change the Arbitrator's decision." (A. 39 n.1.)